Brief of Stockslager & Heard

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

THE MCKINLEY CREEK MINING COMPANY ET., AL. *Appellants*,
vs.
THE ALASKA UNITED MINING COMPANY ET. AL.

No. 240.

Appeal from the United States District Court for the District of Alaska.

BRIEF FOR APPELLANTS.

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Statement.

Peter Hall, William A. Chisholm, James Hansen, John Dalton and Dan Sutherland, partners under the firm name and style of the Alaska United Mining Company, on the 15th day of June, 1899, filed their bill in equity in the office of the clerk of the District Court of the United States for the District

of Alaska, presumably under section 500 of the Oregon Code, which code was made applicable to Alaska by the Act of May 17, 1884, against C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Charles P. Leitch and C. P. Cahoon, partners under the firm name of the McKinley Creek Mining Company, claiming to be the owners by right of prior discovery and location of two certain mining claims therein particularly described, situated on McKinley Creek in the District of Alaska; that being in peaceable possession of said mining claims developing the same, the defendants on the 10th day of June, 1899, setting up an adverse claim or title, forcibly entered upon said premises and attempted to drive plaintiffs therefrom by force and violence, and are still threatening by superior force and a breach of the peace if necessary, to forcibly take possession of said property, asking for an injunction, and that defendants be required to set forth the nature of their claim, and that upon a hearing, they be quieted in their title and possession and that their title be declared valid.

The Record does not show that any summons ever issued, but on the 21st day of June, 1899, the defendants filed their verified answer denying the allegations of plaintiff's bill and by way of cross-complaint claiming ownership by prior discovery and appropriation of both of said mining claims, and the right of possession; and setting up the additional fact that before summons issued in this case, said defendants had commenced in that court a suit at law in ejectment against the plaintiffs in

this action, to settle the right of possession and also for a restraining order against plaintiffs until such suit could be disposed of, and that summons duly issued thereon and was personally served June 22, 1899.

The plaintiffs thereupon, on the 22d day of June, 1899, filed their reply admitting they were in possession to the exclusion of the defendants and denying all other allegations.

Before the trial of the equity suit the defendants moved the court to try the ejectment suit first; and if not done, that the court confine the equity suit to the question of the application for injunction only.

This motion was overruled by the court and proper exceptions taken and allowed.

The defendants went to trial under protest, a jury was empannelled by order of the court, without objection from either side. Oral and record evidence was introduced, proper exceptions to evidence noted in the Record, and at the close of the evidence counsel for defendant moved the court to instruct the jury to return a verdict for the defendant, for the reason that the plaintiff had failed to prove the material allegations of the complaint, and for the further reasons that it appeared from the testimony that McConaghy and Hackley were the only qualified persons to hold the claims in controversy, and that they were the original discoverers of gold upon the claims, and that there is no evidence that either Hall or Chisholm or their agent, Cahoon, ever discovered any gold on either of the claims; that Hackley was upon the claim at all times from the

Hall, Chisholm, and Hawes, on October 6, 1898, all of said parties being residents of British Columbia and not citizens of the United States.

The defendant company claims under location made October 8, 1898, by Hackley of claim No. 1 and by McConaghy of claim No. 2, they being the claims in controversy.

Three principal errors committed by the trial court against the defendant are relied on to reverse the judgment below and are as follows:

First. The alleged locations relied on by plaintiff are utterly invalid because the same are not "distinctly marked on the ground," or otherwise designated as required by law; notwithstanding undisputed proof of such failure to mark said claim, the court refused to instruct the jury that such marking was essential to the validity of a mining location, hence left the jury to infer that such defective marking was sufficient.

Second. The fact is undisputed that Hackley, under whose locations defendant claims, made the first and only discovery of mineral on these claims prior to the attempted location by Cahoon, the attorney-in-fact, on October 6, 1898, Cahoon himself admitting that he made no discovery whatever prior to his attempted locations, but admits also that he based the locations made by him upon the discovery made by Hackley. On this point, the court erred in refusing defendant's instruction No. 8 (side page 344) declaring that a valid discovery of mineral was a prerequisite to a legal location,

and that priority of discovery gives priority of right against a naked location and possession without discovery.

Third. The answer of defendant expressly denies the citizenship of Hall and Chisholm, under whose locations made by their attorney-in-fact, Cahoon, the plaintiff claims. The power of attorney states they are citizens of British Columbia, and plaintiffs offered no evidence whatever to prove their citizenship at the trial. The court therefore erred in refusing defendant's instructions declaring that Hall and Chisholm being aliens and not citizens of the United States, the locations made under their power of attorney for their use were illegal and void.

We therefore beg leave to discuss these three points and cite authorities bearing thereon.

Plaintiff's Location Invalid.

I.

NO MARKING ON THE GROUND.

The Record leaves no question as to the manner in which Cahoon, the attorney-in-fact, attempted to locate these two claims. He having observed Hackley discover and extract gold from claim No. 1 on October 5, 1898, proceeded on the next day, the 6th, to post two notices on opposite sides of the same stump or snag, the one purporting to locate one claim up the creek from the stump in the name

of Hall, while the other purported to locate one claim down the creek from the stump in the name of Chisholm.

At page 50 of the Record Cahoon explains the whole transaction as follows:

> "The next morning we went back into the creek and was prospecting the creek, and I started to write a notice on a snag that was standing up in the creek, and I put on that snag, I, the undersigned, claim 1,500 feet, on one side, signed William A. Chisholm's name to it, and I wrote on the other side of the snag the same writing up the creek and signed Mr. Hall's name to it."

There is no pretense that plaintiff's location was otherwise marked than as above described. It is plain, therefore, that there was no such marking upon the ground as required by the statute (R. S., 2324), since the only act performed by Cahoon consisted in posting the two notices, which act is not required by the statute at all, and cannot be considered as a compliance with the law.

In view of these facts of record the court evidently greatly erred in refusing to properly instruct the jury as to this statutory requirement, observing which instruction the jury must have found plaintiff's alleged location invalid, hence not entitled to recover.

On the other hand, the instructions given for plaintiff and defendant ignore this defect entirely, and evidently misled the jury and left them to presume that plaintiff's locations were regular and valid, and that the only question for them to deter-

mine was which of the respective locations relied on by plaintiff and defendant was prior in point of time. This being a positive statutory requirement, a strict compliance with its provisions has always been held by the courts and the Land Department as essential to the validity of a location.

Lindley on Mines, one of the latest and best works on the subject, at section 371, thus states the rule:

> "The Revised Statutes of the United States contain the mandatory provision that the 'location must be distinctly marked on the ground so that its boundaries can be readily traced.' There is no escape from this requirement. While it is possible that State statutes or local regulations may particularize as to the character of the marking, they cannot dispense with the law of Congress. * * *
>
> "The requirement is an imperative and indispensable condition precedent of a valid location, and is not to be 'frittered away by construction.'"
>
> Citing Gleason *vs.* Martin White M. Co., 13 Nevada, 442.

The Mineral Law Digest, recently published by Clark and others, at page 78, states the rule as follows:

> "A location must be marked to be valid."
>
> Citing Newbill *vs.* Thurston, 65 Cal., 419; Phores *vs.* Muldoon, 75 Cal., 284; Newbauer *vs.* Woodman, 89 Cal., 310; Becker *vs.* Pugh, 9 Colo., 589, and 17 Colo., 243, and Gleeson *vs.* Martin White M. Co., 13 Nevada, 443.

The reasons for the statute and for its strict construction are so obvious that there should be no question about it.

In the case of Goun *vs.* Russell, 3 Mont., 358, the court, referring to this provision, says:

> "This section embodies one of the most ancient customs that has prevailed among miners."

Lindley on Mines, section 37, referring to this provision, says:

> "This was the rule under the Spanish and Mexican law. The object of the law requiring the locations to be marked on the ground is, to fix the claim, to prevent floating or swinging, so that those who, in good faith are looking for unoccupied ground, in the vicinity of previous locations, may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue.
>
> Citing Patterson *vs.* Tarbell (Ore.), 37 Pac., 76; Gird *vs.* Cal. Oil C., 60 Fed. Rep., 531.

And in Faxon *vs.* Bernard, 2 McCrary, 44; 4 Fed. Rep., 70, it was said:

> "The Government gives its lands to those citizens who may discover precious metal ores therein, upon the condition that they will define the subject of the grant with such certainty as may be necessary to prevent mistakes on the part of the Government and on the part of other citizens who may be asking the like bounty."

We have found no case decided by the courts or by the Land Department holding that acts such as those performed by Cahoon, consisting merely of writing a notice on either side of a snag, was a sufficient marking on the ground for the two locacations claimed. In fact, there was no attempt at all to mark the locations on the ground.

These locations were of placer claims and require the same strictness in marking on the ground as lode claims. The courts have held that notwithstanding the fact that where the lands are surveyed placer claims are required to be adjusted to the surveys, yet it is not sufficient marking in such a case, to post the claim as of the particular subdivision of the survey.

Anthony *vs.* Jelison, 83d Cal., 296.

In White *vs.* Lee 78 Cal., 593, it was held—

> "In locating placer claims by legal subdivisions, it is not sufficient merely to post a notice referring to the legal subdivision, but, it is necessary to mark the lines of the location."

In the case of Anthony *vs.* Jellison, *supra*, it was held—

> "Failure to mark the boundaries of the location is fatal to its validity. and the defect is not cured by the fact that the location notice gave the section numbers constituting the claim."

If then it is necessary to mark the location of a placer claim on the ground, in a case where the United States surveys have marked the section and

the subdivisional lines on the ground, where they might be found by any competent surveyor, how much more important is it to thus distinctly mark the location on the ground where there is no Government survey or any other method of ascertaining the exact location of the claim, than the marking made by the locator.

The following cases hold the attempted marking on the ground, in each case described, was not a sufficient compliance with the law.

In the case of Holland *vs.* Auburn Gold Quartz Mining Co., 53 Cal., 149, it was held—

> "The posting of a notice upon a tree at each end of a mining claim is not a sufficient compliance with R. S., 2324, which requires the location to be distinctly marked on the ground so that its boundaries can be readily traced."

In Jupiter *vs.* Bodie Con. Mining Co., decided by the U. S. Circuit Court, District of Cal., (11th Fed. Rep., 666) the court instructed the jury as follows:

> "Any marking on the ground claimed, by stakes and mounds, and written notices, whereby the boundaries of the claim can be readily traced, is sufficient. But there must be some such marking * * *
>
> "If the jury believe that before the location of plaintiffs thereon, it was actually and distinctly marked on the ground by stakes, notices, monuments and work, so that its boundaries could be readily traced, discovery made, etc., the location is valid."

In the case of Croceus M. & M. Co., *vs.* Smelting

Co., U. S. Circuit Court District of Colorado (19 Fed. Rep., 78) Judge Hallett held—

> "The statutes of Colorado afford no support to one who in locating his claim fails to set the proper stakes at the end of the claim when the proper position for them was not inaccessible, but merely difficult of access or approachable by a circuitous route. In such case the title will only relate to the time when the stakes are properly set."

In the case of Book *vs.* Justice, U. S. Circuit Court (58 Fed. Rep., 107) Judge Hawley said:

> "The question as to the sufficiency of the marking of the boundaries depends to some extent upon the character and condition of the ground located. Where the location is made upon a comparatively barren hillside, the posting of stakes at each of the four corners, either by driving stakes in the ground, or building of stone monuments so as to keep the stakes in place is a sufficient compliance with the law."

In the case of Gelwich *vs.* Morarity (53 Cal., 217) it was held—

> "Placing a monument in the center of a claim and posting a notice thereon defining the claim, is not a compliance with the act, which requires locators to mark distinctly their locations on the ground so that the boundaries can be readily traced."

In the case of Newbill *vs.* Thurston (65 Cal., 419) it was held—

> "Erecting discovery monument and placing a notice on it claiming a certain number of feet

along the ledge in both directions is not a valid location of a mining claim under the act of Congress."

See also the cases of Golden Fleece, etc., *vs.* Cabel Con. Co., 58 Fed. Rep., 106; Gleeson *vs.* Mining Co., 13 Nev., 442; and Doe *vs.* Waterloo M. Co. 70 Fed. Rep., 455.

In the later case Judge Knowles speaking for the court said:

"There is a considerable space in the brief of the appellee devoted to maintaining that the notice and acts of Newbill were a sufficient location of the Red Jacket claim; that the one stake he placed upon the ground, claiming 500 feet one way and 1,000 feet in another way on the vein discovered, with 300 feet on each side of the same, was a sufficient marking of the boundaries thereof. In the location of quartz lodes, before the mineral act of 1872, such a mode of location was common. Since that date, I know of no instance in which such a location has been sustained. Since that date it has generally been held that in some way the location should be made in the form of a parallelogram, and the location so marked that the boundaries can be readily traced."

In the case at bar it is perfectly clear that Cahoon not only did not "mark the locations on the ground," as required by law and the decisions hereinbefore cited and quoted, but, that he did not intend to do so, he, himself, testifying that the pencil writing on each side of this old snag was intended only as temporary notices put up for the purpose, not of holding the ground as against Hackley, the discov-

erer of mineral, but of keeping strangers who might pass while they were doing further prospecting from seeing the gold Hackley discovered and attempting to locate the ground. His testimony also shows conclusively that he recognized the prior rights of Hackley, the first discoverer, who was still on the ground prospecting and at no time sought to take advantage of Hackley's labor and discovery. His whole conduct proves that he did not intend by his acts to make locations of the ground in controversy. He doubtless had in mind the laws of some of the States which provide for a temporary posting of notice under which time is given to prospect with a view to determining the course of a vein and the extent of the deposit, and of subsequently marking the location on the ground, or not, as might seem to him best.

But, be this as it may, from what was done by plaintiff's grantor it would be impossible for an expert surveyor even, let alone the ordinary miner, to determine the location of the lines of the claims in controversy.

At page 52 of the Record said grantor and locator, Cahoon, was asked to state as plainly as he could just what was written by him on the snag, and his answer was—

> "I, the undersigned, claim 1,500 feet running down this creek and 300 feet on each side."

Now, in the first place, "this creek" was not named at that time, but was subsequently named McKinley creek by Hackley (Record, p. 78).

A surveyor could not have located the creek from this description, and if the creek had been pointed out to him, he could not have laid down the lines from the description on the snag. How could he have determined whether the center of the creek with its meanderings should be the middle of the claim or whether, to follow the exact language of the notice, it should extend 300 feet on either side of the creek? But, we submit, that even if one competent to survey and measure distances from the notice could have determined the exact locus of the claims, it would not be in any sense a compliance with the law. The law does not require the prospector to hire a surveyor to locate the lines and corners of prior locations. That duty is specifically required by law of every locator. He must *distinctly* mark the location on the ground so that the lines may be *readily* traced, not by the use of a surveyor's chain and compass, but by any one who has eyes to see such distinct marking.

In this case there can be no doubt, we think, but that if the trial judge had properly instructed the jury as to the positive statutory requirement of so distinctly marking the locations on the ground as that their boundaries could be readily traced, and that a failure to do so was fatal to the locations of plaintiff's grantor, in the face of the subsequent locations by Hackley and McConaghy, the original discoverers, the verdict would have been for the defendant, and for this reason the decision should be reversed.

Now, in addition to the objection above pointed out, plaintiffs base their priority of right upon the

locations made by Cahoon on October 6th in favor of Hall and Chisholm; but by reference to page 174 of the Record *et seq.* it clearly appears that plaintiff's case rests not on the location notices posted by Cahoon on the snag, as the location notices introduced at the trial by Hall and Chisholm are signed by them respectively and not by Cahoon. It is not pretended by Hall and Chisholm that these location notices are exact or real copies of those posted by Cahoon, and as shown by comparison with Cahoon's testimony as to what he wrote in the notices posted by him, they are totally different in both form and substance, for it cannot be disputed that the notices posted by Cahoon were wholly indefinite and uncertain, while the pretended copies were no doubt constructed on the 20th of October, two weeks after Cahoon's attempt, when Hall and Chisholm claim to have returned and posted the notices offered in evidence.

It appearing, therefore, that the location notices offered by Hall and Chisholm in evidence were not only not the notices posted by Cahoon, but not even copies thereof, nor signed by him, it must be held that they have no legal connection or relation to the pretended locations made by Cahoon; and as they were not posted or signed by Hall and Chisholm until the 20th of October, the prior locations made by Hackley and McConaghy, October 8, must prevail. We call attention to the refusal of the court to sustain defendant's objections to the introduction of these pretended notices of location in evidence, their introduction and consideration by the jury, and the exceptions saved to the ruling

of the court by counsel for defendant. See pages 174, 175, 176, and 177 of the Record.

II.

No Discovery of Mineral.

But, aside from the utter failure of plaintiff's grantor to mark the locations upon the ground as required by the law, there is another fatal defect in them.

There was no discovery of mineral by Cahoon upon the ground prior to his posting the notices hereinbefore described. Upon this point also the trial court committed a fatal error in refusing to give instruction numbered eight (8) asked by the defendant, which is as follows:

> "I also instruct you that there is something more required to make a good location of a placer mining claim than the mere putting up of stakes and the making of proper location notices in writing, and filing the same. In order to make a good and sufficient location in the eyes of the law, it requires discovery of precious metals upon the claim, and also appropriation of the land embraced in such notice. A location can rest only upon the actual discovery of precious metal (in this case gold). Such discovery must precede the location or be in advance of intervening rights. Priority of discovery gives priority of right against naked location and possession without discovery. So in this case, gentlemen of the jury, if you find that the location made by Cahoon of the two claims in controversy was made without the said Cahoon's prior thereto dis-

covering precious metal or gold, and that said location was in every respect legal, excepting the discovery of precious metal upon the premises, and that Hackley and McConaghy found upon their respective claims and discovered gold and made a subsequent location to that of Hall and Chisholm, and that the said Hackley and McConaghy were the original discoverers of gold upon the said claim or discovered before the said Cahoon or the said Hall or Chisholm, then the location of the said claim by Hackley and McConaghy is a better location than that of Hall and Chisholm, although Hackley and McConaghy's location of said claims may be subsequent in date to that of Cahoon; and if you find said facts in favor of Hackley and McConaghy, then you should find a verdict for the defendant company" (Record, p. 191).

This instruction, as shown by the Record, the court refused to give, and the only instructions given the jury upon this point are instruction No. 1 given on behalf of the plaintiff as follows:

"Gentlemen of the jury, you are instructed that on the 6th day of October the ground in controversy in this suit belonged to the United States and was open to location as mining claims." * * *

And instruction No. 5, given on behalf of plaintiff, which is as follows:

"Now, much has been said by counsel as to a preliminary location and as to the time a man has to explore his premises before another man has a right to locate, because it is contended on one side that Hackley was the discoverer, and on the other side that Sutherland

was, and on that point of discovery I instruct you that any of these persons, if they saw or extracted or failed to extract, but saw being extracted any precious metals, it is a sufficient discovery to authorize him or them to make a location; so I say any of these persons, if they saw gold taken from the ground, that they are discoverers in the sense that authorizes a man to locate" (Record, pp. 142, 143).

We insist that the instruction asked by the defendant is a succint and accurate statement of the law applicable to the evidence in this case.

Three paragraphs in said instructions so asked cover the law upon this point. These are:

(1) "A location can rest only upon the actual discovery of precious metals.

(2) "Such a discovery must precede the location or be in advance of intervening rights.

(3) Priority of discovery gives priority of right against naked location and possession without discovery."

As to the necessity for a discovery prior to location the statute is, if possible, even more explicit than as to the marking on the ground for, as will be seen from the language of the act, locations are *absolutely prohibited* until the discovery of a vein or lode within the limits of the claim located (Sec. 2320, R. S.) It follows that a location made prior to discovery by the locator is unlawful and void.

In the case of King *vs.* Amy, etc., (152 U. S., 222), this court said:

"A location can only rest upon an actual discovery of a vein or lode."

Lindley on Mines, section 335, states the requirement thus:

"Such discovery must precede the location, or be in advance of intervening rights."

The author cites a number of decisions of the Supreme Courts of the various States in support of the text.

Barringer and Adams on the Law of Mines, page 214, refer to this statutory requirement as follows:

"No right can be acquired by location before discovery."

See also to the same effect—

North Noonday M. Co. *vs.* Orient M. Co., First Fed., 522; 6 Sawyer, 299.
Jupiter M. Co. *vs.* Bodie C. M. Co., 11 Fed., 66.
Chesman *vs.* Shreves, 40 Fed., 787.
McLaughlin *vs.* Thompson, 29 Pac., 816.
Burke *vs.* McDonald, 33 Pac., 49.

The Land Department has uniformly held that discovery must precede location. In the case of Etling, *et. al. vs.* Potter (17 L. D., 424) Secretary Smith said:

"It will be seen that there is no competent evidence to show that the claims were ever located. When the witness says he has located a mining claim, he is simply stating a legal conclusion. *A location must be made on a discovery of mineral.*"

To the same effect are the cases of Southern Pacific R. R. Co. *vs.* Marshall (17 L. D., 545) and Castle *vs.* Womble (19 L. D., 455). In the latter case Secretary Smith said:

> "The law is emphatic in declaring that 'no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' (Revised Stat., 2320.) This is a prerequisite to the location, and, of course, entry of any mining claim. Without compliance with this essential requirement of the law no location will be recognized and no entry allowed."

In the case of Wilson Creek M. M. Co. *vs.* Montgomery (23 L. D., 476), Secretary Francis, referring to the decision of Noyes *vs.* Mantle (127 U. S., 348), said:

> "The location which when duly recorded the court held to be constructive notice of the existence of a vein or lode, was one 'made under the law' and meeting, at the time, all the requirements of the law—that is, among other things, one made after the discovery within its limits of a valuable vein or lode (Sec. 2320 R. S.), * * *
>
> "The proposition that any recorded notice of a so-called lode location is conclusive presumption of the existence of a valuable lode or vein within its limits, as would seem to be the contention of this motion needs, it would seem, in view of the law and the history of mining claims and operations, only to be stated to be refuted."

These authorities fully support the instruction asked by defendant to the effect that discovery must precede location or be in advance of intervening rights. The other paragraphs of the instruction asked last above quoted are also in accordance with reason and justice, in harmony with the whole spirit of the mining law and regulations, and supported by the decisions of the Land Department and the courts. That priority of discovery should give priority of right against naked location and possession without discovery is certainly sound law as well as simple justice to the discoverer, provided he has not abandoned the claim. It follows, therefore, that the instruction of the court to the effect that if Cahoon or any of the other parties saw Hackley discover gold upon the claim they could make a valid location without any regard whatever to his rights as a discoverer, is not the law, and must have misled the jury as to the validity of the locations of plaintiff's grantor. While it might be admitted that as an abstract proposition of law the statement that seeing others discover gold or other precious metals would be sufficient discovery upon which to base a location so far as the United States are concerned and as against all others, *except the discoverer or discoverers*, is sound and proper, but because of this exception, the instruction of the court was clearly inapplicable to the case on trial, and the error is just as fatal to plaintiff's case as if the instruction had not embodied a correct principle of law as applied to a case where no one was claiming any adverse rights as a prior discoverer.

In the case of Winter Lode (22d L. D., 362), Acting Secretary Reynolds said:

> "The statute itself and all decisions of the Department and the courts make the discovery of mineral a prerequisite to the location of a mining claim, and the discovery must be upon land *open to exploration not claimed or located by any other person.*"

This decision states the law governing cases like the one at bar, and supports the contention of defendant's counsel and the correctness of the instruction asked by the defendant, as well as showing the error committed by the court in the instruction given, which ignored entirely the rights of Hackley, the discoverer, who was on the ground protesting against the locations at the time they were made, and who, two days thereafter, located the same ground.

The statement of the court in its charge to the jury that it was claimed on the one hand that Sutherland made the first discovery, and on the other side that Hackley made it, was also misleading to the jury.

But we do not think it is at all material to the case, for the reason that it is perfectly clear Sutherland either recognized Hackley's right as the first discoverer, or he regarded his discovery as not of sufficient value or importance to justify the making of a location on it, for it is conceded that he went higher up the creek than either of the claims in controversy and made his own location, claiming no right whatever by reason of any pre-

tended discovery made by him upon either of these claims. In fact, it is not definitely shown that Sutherland's pretended discovery was upon either of the claims in controversy.

Again, Cahoon did not claim to have made the locations upon any discovery other than that made by Hackley, as shown by his very full testimony upon that point at page 50, Record.

It is thus made clearly apparent that this charge of the court was erroneous, not applicable to the case, and misleading to the jury.

Exclusive Rights of the Discoverer.

Another charge of the court, numbered 6, given by the court on behalf of the plaintiff, is equally erroneous and likewise misleading to the jury. It is as follows:

> "Now, just a word as to the time a man has after discovery before he must take steps to locate: It must be a reasonable time; a man cannot discover gold in one place and hold the whole world at bay while he explores the whole creek; he must act promptly; it is the policy of the law to allow to the thrifty the benefit of their energy, and it is often the experience that the discoverer does not get the best claims; he must make up his mind within a reasonable time, and it is a question of fact for the jury, and he is not permitted to hold the whole district until such time as he may determine which claim he desires to locate" (Record, p. 143.)

Now, the undisputed facts are, that Hackley discovered gold between 4 and 5 o'clock on the even-

ing of October 5, and that immediately thereafter all of the members of the party left the ground, went out on the benches of the creek and camped together for the night; that they all returned to the ground early next morning and Hackley commenced further prospecting on the ground where he had discovered the gold late the evening before; that very soon thereafter Cahoon commenced writing the notices on the snag near the creek and Hackley protested, he claiming the ground on account of his prior discovery; that Cahoon admitted that he had no right to the ground, and claimed none, but put up the temporary notices, as he swore, to keep others off and agreed to remove them thereafter. It also appears that Hackley, accompanied by Sutherland and Hand, continued their prospecting, got separated from the other members of the party and did not return to the camp on the benches of the creek until some time the next day; that on the 8th, which was the next day thereafter, he and McConaghy made location of the two claims in controversy, McConaghy in the mean time having made discovery on the claim located by him.

These undisputed facts show with what diligence Hackley followed up his discovery and also the action of Cahoon in attempting to locate the claims upon Hackley's discovery at the very first opportunity after the discovery was made.

Did any of these facts justify the direct and unmistakable inference of the court in his charge that Hackley was trying to hold the whole creek and keep the whole world at bay for an indefinite

time? If they do not, then the charge is erroneous. There is no pretense that Hackley ever made or attempted to make any other location than the one based upon his original discovery.

What are the rights of a discoverer and what exclusive right has he to make location upon his discovery, and if he has such right, within what time must he exercise it?

The charge of the Court taken as a whole is clearly to the effect that the discoverer has no exclusive right for any length of time whatever, but that any one who saw the discovery made, or who saw the mineral after it was discovered, could make a valid location at once and thereby deprive the discoverer of any right to make a subsequent location. In other words, that any such subsequent location by the original discoverer would be void.

The court also seemed to have been determined that the jury should not misunderstand his view of the law upon this point, for, as we have seen, he instructed the jury that although the mineral had been discovered late on the evening of the 5th, and Cahoon, who did not make the discovery, or make any claim whatever to have done so, but based his action entirely upon the discovery made by Hackley, had a right to make said locations, because, as he stated in the charge, the land at the time Cahoon undertook to make said location was "open to location as mining claim".

We have, then, this proposition, plainly and unmistakably put viz., Can a discoverer of mineral, who makes his discovery late in the evening, and who must leave the ground to camp for the night,

be deprived of all right to make location based on such discovery, if not made prior to an early hour the next day?

Lindley on Mines, section 339, thus states the rule upon this point:

> "When a prospector has made such a discovery as will satisfy the law and form the basis of the location, he is allowed, in most of the States and Territories, a specified time in which to perform the remaining acts which are requisite to perfect the location. As to whether, in the absence of such legislation and district rules, the discoverer has any appreciable time within which to mark his boundaries and complete his location is a subject upon which the courts differ.
>
> "The Supreme Court of California holds that while, if the locater be on the ground actually engaged in making the location, another could not locate over him, yet in the absence of local rules authorizing it, no time is allowed to perfect the location; that until it is actually marked on the ground the claim is not appropriated so as to prevent its acquisition by a subsequent locator.
>
> "The Circuit Court of Appeals for the eighth circuit was called upon to determine the question upon the same evidence and the same state of facts arising in one of the California cases (Newbill *vs.* Thurston, 69 Cal., 419), and that tribunal declined to accept the rule announced by the California courts. The Court of Appeals held, that after discovery and posting a notice thereof, the locator had a reasonable time in which to complete the location; that what was a reasonable time would depend upon the facts of each particular case; that evidence

of customs prevalent in other localities on this subject might be received for the purpose of aiding the court in its determination, and that, under the circumstances of that case, twenty days was a reasonable time. (Doe *vs.* Waterloo M. Co., 70 Fed. Rep., 455, affirming the decision of Judge Ross in same case, 55 Fed. Rep., 11.)

"The doctrine announced by the Circuit Court of Appeals is in consonance with the views expressed by the Supreme Courts of Nevada and Idaho and in accord with the spirit of the law as interpreted by the Supreme Court of Colorado and the Supreme Court of the United States.

12 Nev., 312.
13 Nev., 442.
2d Idaho, 646.
2d Colo., 300.
3 Colo., 533.
Erhardt *vs.* Boraro, 113 U. S., 527.

"To hold that a miner as soon as he discovers a lode must immediately stake the territory which he is entitled to claim, in order to protect it from invasion and claims of other persons, would be an unreasonable if not an impossible requirement.

Omar *vs.* Soper, 11 Colo., 380. * * *

"Whenever preliminary work is required to define and describe the claim located, *the first discoverer must be protected in the possession of his claim until sufficient excavation and development can be made so as to disclose whether a vein or deposit of such richness exists as to justify the work to extract the metal.* Otherwise the whole purpose of allowing the

free exploration of the public lands for the precious metals would in such cases be defeated, and force and violence in the struggle for possession instead of previous discovery would determine the rights of the claimants."

Erhardt, Boraro, *supra.*

Marshall *vs.* Harney Peake Tin M. Co., 1 S. D., 350.

Omar *vs.* Soper, *supra.*

The last two paragraphs are quotations from the decision of the court in the case of Erhardt *vs.* Boraro, and the law as stated therein is so applicable to the case at bar that it seems to us it is decisive of this case. If the first discoverer *must* be *protected* until he can make such excavation and developments as may be necessary to disclose whether the vein is of such richness as to justify the work of extracting the metal, how can it be said that other parties who made no discovery could invade Hackley's ground without giving him a single hour of daylight to make excavations and explorations?

Barringer & Adams on the Law of Mines and Mining, at page 197, thus state the law:

"One in actual possession of Mining ground who has discovered and uncovered the lode, but has failed to take the other steps required by law to complete his location cannot be ousted by a subsequent discoverer from the ground actually held by him. A location cannot be extended over a senior discovery in the actual possession of another. Citing, Faxon *vs.* Barnard, 2 McCrary 44—4 Fed. Rep., 702.

In the case last above cited it was held—

> "If the first discoverer is shown to have been on the ground before the time when the second discoverer attempted to make his location, it is for the latter to show that the first discoverer had given up his possession." Citing Lebanon M. Co. *vs.* Cons. Repub. M. Co. 6 Colo., 371.

We are satisfied the foregoing cited and quoted authorities state the law correctly as applied to this case, where no State laws or district regulations existed, and we must look to the Statutes of the United States alone to determine the question involved. And applying the doctrine so held to the case, it must be clear that the charges given by the court are not the law, and must have misled the jury.

It is not disputed that as soon as it was light enough for the parties to see on the morning of the 6th of October, following the discovery made at 4 or 5 o'clock the evening before, after breakfasting, they all went upon the premises in dispute; that Hackley was on the ground prospecting it when Cahoon attempted to post the notices relied on by plaintiff; that he protested and objected as shown by the testimony of Cahoon, who, upon cross-examination in answer to the question whether Hackley made same objection to notice posted on the other side of snag, said:

> "I couldn't say as to that. I don't see how he could raise any more objection than he did." (Record, p. 70.)

This testimony is undisputed. That Hackley was actually present on the ground claiming it because of his prior discovery and protesting against the action of Cahoon when he attempted to post up the notices upon which plaintiff's case rests is fully shown by the evidence and will not be disputed. That the errors committed by the trial court in giving the instructions hereintofore set out and in refusing to give that asked by the defendant, are directly responsible for the verdict of the jury against the defendant must be apparent.

Unless the court shall hold that the man who discovers mineral late in the evening must proceed to locate the ground that night in order to protect him from the invasion of others, who saw him make the discovery, then it must be held the court committed fatal errors at the trial of the cause, for which the judgment rendered should be reversed.

III.

Location by Alien Void.

But, even though there had been a proper discovery by plaintiff's grantor and he had marked the boundaries of the claim according to law, the locations were made by a person prohibited by law from either exploring, occupying, or purchasing the mineral lands of the United States, he being an alien.

This question was distinctly raised, not only as to the locator, but as to each and all of the persons constituting the plaintiff partnership by the first

paragraph of the defendant's answer to plaintiff's complaint (Record, p. 146).

It was also raised and the point saved by proper exceptions, as to Hall and Chisholm, by the following instruction asked by the defendant and refused by the court, as well as by the instruction given as follows:

> "The court also erred in not giving the following instruction, which was asked by the defendants and refused by the court: 'I also instruct you that in order for the plaintiff to recover it must be proven that Hall and Chisholm were at the time they located and took up their respective claims citizens of the United States' for the reason that it was an issue in the case made by the pleadings, and it was necessary under the circumstances to be proven, and the court, on the contrary, instructed the jury as follows, which was excepted to by the defendants, and exception allowed, to wit: 'The instructions which I have read you cover the law features of this case pretty completely. The question of the citizenship of the plaintiffs has been raised by counsel in their argument, and I charge you, that the citizenship of either the plaintiff or the defendant in this case is not an issue of fact to be determined by you at all; it is not necessary for me to instruct you whether it is necessary for either the plaintiff or the defendant to be a citizen of the United States, the law unquestionably is that the question of citizenship can only be raised by the United States Government, and one man against another cannot question the citizenship of either. If you apply for a patent the United States has a right to question the citizenship, because the purpose is to get a

> title. In other words, if there has been a law in this district prohibiting the location of mining claims by aliens that could be only taken advantage of by the Federal Government;' which said last instruction is against the law and the issues made up by the pleadings in this case, for in the complaint it is alleged that Hall and Chisholm attempted to locate the claims in controversy and that said allegation is denied by the defendants in their answer."

Thus the question is fairly presented whether it is necessary in an action such as the one at bar, based upon locations of the public mineral lands, and against locators who are citizens and claiming title under their locations, to allege and when denied, prove, that the plaintiffs are citizens? Or, if not necessary to prove plaintiffs are citizens, is it necessary in such cases to prove the locators were, at the date of their locations, or prior to the attaching of the defendants' claim, citizens of the United States, or aliens having declared their intention to become such?

Evidently counsel who prepared the pleadings for the plaintiff was of opinion it was necessary to plead the citizenship of plaintiffs, as he made such allegation in the complaint, and that it was specifically denied by defendant's counsel shows it was so regarded by them. But the court did not consider it important that either the locator or their grantees, the plaintiff, should establish such qualification, and he so instructed the jury. Is that the law?

The whole question, and the view taken of it by

the court, is succinctly stated in the charge given, wherein he says:

> "It is not necessary for me to instruct you whether it is necessary for either the plaintiff or the defendant to be a citizen of the United States, the law unquestionably is that the question of citizenship can only be raised by the United States Government, and one man against another cannot question the citizenship of either. If you apply for a patent the United States has a right to question the citizenship because the purpose is to get a title. In other words, if there has been a law in this district prohibiting the location of mining claims by aliens that could be only taken advantage of by the Federal Government."

This view of the law is doubtless based upon some of the decisions of this court, notably that of Manual *vs.* Wolf, 152 U. S., p. 505.

But we do not think the doctrine enunciated in these decisions is applicable to the case at bar.

If it be conceded, which we do not do, that an alien could, in the teeth of the statute, explore, occupy, or locate mining claims, and that no one could bring an action against him to oust him of this possession, except the United States, yet, that would not affect the question in this case, for the reason that in this case these aliens bring an action under section 500 of the Oregon Code against citizens who have connected themselves with the title of the Government, for the quieting of their *title* and the enjoining of the defendants from interfering with them. In order to maintain such action they must show their *right* to the exclusive posses-

sion of the ground in dispute. Hence, they aver in their complaint their citizenship which, as we have seen, was specifically denied by defendants.

The construction of this section of the Oregon Code, and of similar statutes in other States, is uniform, to the effect that the plaintiff, in order to succeed, *must show that his possession is lawful.*

Fishenor *vs.* Knapp, 6 Ore., 205.
Murphy *vs.* Sears and Holman, 11 Ore., 127.
San Francisco *vs.* Ellis, 54 Cal., 72.
Stark *vs.* Starr, 6 Wall., 410.
Holland *vs.* Challin, 110 U. S., 595.
Frost *vs.* Spitley, 121 U. S., 552.

"To sustain jurisdiction in equity, on a bill to quiet title, there must be clear evidence of title."
Smith *vs.* Bourman, 13 Cal., 107.
Citing Trustees of Louisville *vs.* Gray, 1 Littell, 147.
Morton *vs.* Beaser, 2 Ohio, 495.

Now, here are aliens invoking the aid of the court to protect them in maintaining a right which the statute specifically prohibits them from holding. It is not a question whether some one other than the United States can raise the question of their right, but rather whether they have a right to go into a court of the United States and raise a question as to the title of the defendants who are citizens without first showing their own possession is *lawful.*

The case of Stark *vs.* Starr, *supra*, was an action

brought under this section of the Oregon Code and Justice Field, in that case said:

> "His possession must be accompanied with a claim of right; that is, must be founded upon title, legal or equitable, and such claim or title *must* be exhibited in the proofs, and perhaps in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest."

From these authorities it is clear that the plaintiff in the case should have been required to make out a clear case of the *right* or *lawfulness* of its possession. In order to do this the averments of the complaint as to citizenship was an essential part of the case and defendants motion for non suit at the close of the evidence, specifically setting forth this as one of the grounds therefor, should have been sustained. Since, under the provisions of the statute neither the members of plaintiff, partners, nor the locators, were permitted to acquire any right to mineral land, it not being open to exploration, occupation, or purchase by them, it was impossible for them to show plaintiff's possession under these attempted locations was "lawful" as they are required to do in order to recover in this action.

Barringer & Adams on Mines and Mining at 202, say:

> "*A location by an alien is void.* But it may be validated by subsequent naturalization, in which case the location will date from the declaration of intention and not from the mak-

ing of the location. It follows, therefore, that work done previously to the declaration of intention will inure to the benefit of the locators, but will not cut out intervening rights. * * *

"The *fact of citizenship* is an essential to the validity of the location, *and must be affirmatively proved by one who alleges a location*, and its decision is a question for the jury."

This seems to be a clear and correct statement of the law. It is in harmony with the statute and we think supported by authority.

A location by an alien is void, but may be validated by naturalization, if done prior to the intervention of adverse rights.

Citizenship is essential to the validity of a location and must be affirmatively proved by one who alleges a location.

The Supreme Court of Idaho in the case of Bohannon *vs.* Howe, (2 Idaho 417, 17 Pac. 583) held:

"In an action for trespass upon mining ground when the legal title is in the United States and the plaintiff's right is founded on a possessory title, *he must allege and prove his citizenship.*"

In the case of Wilson *vs.* Triumph Con. M. Co. (56 Pac., 300), the Supreme Court of Utah held:

"A qualified locator may relocate a mining claim in the possession of an alien who has not declared his intention to become a citizen, if relocation be made without force or violence, and prior to declaration of intention or conveyance to a citizen. As against an intruder pos-

session is *prima facia* evidence of right to possession, but as against one connecting himself with the Government title, mere occupancy must yield to the higher right." Citing Sparks *vs.* Pierce, 115 U. S., 408, and Brandt *vs.* Wheaton, 52 Cal., 480.

To the same effect is the case of Golden Fleece Gold etc. Co. *vs.* Cabel Cons. Gold etc. Min. Co., 12 Nev., 312.

II.

Power of Attorney and Acts Thereunder.

Cahoon, the attorney-in-fact under the power of attorney introduced in evidence by the plaintiff, (Record p. 3) had no right or power to make the locations in controversy in this case.

That instrument authorized him to make *one joint location* for Hall, Chisholm, and Hawes, and nothing else.

The language used by the parties in conferring such power, is plain and unambiguous, and hence does not require any construction.

It follows that his acts in posting notices on these claims, one for Hall, individually, and another for Chisholm, individually, were wholly unauthorized and for this reason are illegal and void.

He was authorized to locate but one joint claim for the three parties executing the instrument.

The language used by the parties conferring the power is plain and unambiguous and its construc-

tion must follow the plain import of the language used. It must be strictly construed.

Bosseau *vs.* O'Brien, 4 Bliss, 395.
Brantly *vs.* Southern Life Ins. Co., 53 Ala., 554.
Johnson *vs.* Wright 6, Calf., 373.
Golinsty *vs.* Allison, 114 Calif., 458.
Chase *vs.* Dana, 44 Ill., 262.
Wood *vs.* Goodbridge 6, Cush., 123.
Gilbert *vs.* Howe, 45 Minn., 121.
Mechanics Bank *vs.* Schaunbreau, 38 Mo. 228.
Craighard *vs.* Peterson, 72 N. Y., 284, 28 Am. Rep. 150.

"The authority of an agent under a written instrument is limited to the plain import of the language of the instrument."

Wynne *vs.* Parke, 89 Texas 413, 34 S.W. 907.

The court instructed the jury to the effect, that after Cahoon had made a location his agency was at an end, that he could not change it, and that any attempt to do so, was invalid unless ratified by the principals.

But, the court again utterly failed to instruct the jury as to *what acts were necessary to constitute a valid location* but left the jury to infer this posting was sufficient.

This instruction was given to apply to the testimony introduced to show that Hall and Chisholm had ratified the acts of Cahoon in subsequently making the two locations he made for them, and which, are not in controversy in this case.

If we are right in our position that the acts of Cahoon, as to the claims in controversy not being

required by law, and that he did not take a single step required by law as to these claims to make a valid location; and in addition positively and specifically swore he did not intend such acts to be a location, then the charge of the court as to abandoning these locations and making others, and as to the invalidity of these latter locations, unless ratified, is immaterial and tended to mislead the jury.

Therefore defendant insists:

First. That plaintiff has failed to show any legal title to the property in controversy under its alleged locations or otherwise.

Second. It being admitted by the Record that neither the original locators, the defendant company nor any of its members are citizens of the United States, but aliens, plaintiff thereby fails to show or prove such legal interest or title in the premises as will sustain its action against the defendant.

Wherefore defendant prays that the judgment of the lower court be in all things reversed and set aside; and that the defendant's prior right and title to the premises in controversy be sustained and decreed, and all other relief as prayed by defendants' cross-bill as shall be found just and proper.

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Geo. C. Heard,
Attorneys for Appellants.

Washington, D. C.

Supreme Court of the United States.

October Term, 1908.

McKINLEY CREEK MINING COMPANY et al., *Appellants*,

vs.

THE ALASKA UNITED MINING COMPANY et al.

No. 87.

Appeal from the United States District Court for the District of Alaska.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

McKINLEY CREEK MINING COMPANY *et al.*, *Appellants*,
vs.
THE ALASKA UNITED MINING COMPANY *et al.*
} No. 37.

Appeal from the United States District Court for the District of Alaska.

Supplemental Brief for Appellants.

The above-entitled cause having been argued and submitted to the Court at the October term, 1900, the Court, on the 28th day of October, 1901, handed down the following request:

> "Counsel are requested to file briefs on the question as to what errors, in respect of giving or refusing instructions or other rulings on trial by a jury in a case of this character, are open for consideration on appeal from the District Court of Alaska."

In compliance with this request, we beg to submit the following points and authorities:

Act of May 17, 1884.

By the Act of May 17, 1884 (23 Stat., 24), the District Court of Alaska was established and was given the jurisdiction of district courts of the United States, district courts exercising circuit court powers, and also general law and equity jurisdiction. (McAllister *vs.* The United States, 141 U. S., 174; *Ex parte* Cooper, 143 U. S., 472, citing Durousseau *vs.* The United States, 6 Cranch, 307.)

By section 7 of the same act the final judgments and decrees of said court are reviewable by the Supreme Court of the United States "as in other cases."

The terms "as in other cases" necessarily refer to the procedure for review provided by sections 691 and 692, Revised Statutes, governing district and circuit courts having like jurisdiction; section 691 applying expressly to judgments in common law actions, and section 692 to decrees in equity, admiralty, and maritime cases. Under the former, section 691, such judgments can only be reviewed on writs of error, and under the latter, section 692, decrees in equity are to be reviewed alone on appeal, by which the entire record is brought up for consideration.

This action was commenced by the appellees on the equity side of the court under section 500 of the general laws of Oregon, which reads as follows:

> "Any person in possession by himself or his tenant of real property may maintain a suit in equity against another who claims an estate or interest therein adverse to him for the purpose of determining such claim, estate, or interest."

This statute upon its face shows that any proceeding under it must be an equitable proceeding, and the record shows that this case was so treated by the lower court in refusing to fix the amount of stay bond, in order that the defendant might, pending the appeal to this Court, remain in possession of the property, giving as one of the reasons "that the cause was tried as an equity one and on the equity side of the said district court." (Record, p. 205.)

It also appears that appellees in their bill asked for, and the court granted, upon the final hearing a perpetual injunction against the appellants.

If anything further were necessary to fix the character of an action under this section of the Oregon Code, as being distinctly a proceeding in equity, the decision of this Court announced by Mr. Justice Field in the case of Stark *vs.* Starr, 73 U. S. (6 Wall., 402), might be cited.

This, then, being an equity case it is properly brought to this Court by appeal under section 692, Revised Statutes. The distinction between an appeal and a writ of error and the questions which each present for review was clearly stated by Chief Justice Ellsworth in Wiscart *vs.* Dauchy, 3 Dall., 321, as follows:

> "An appeal is a process of civil law origin, and removes the cause entirely, subjecting the facts as well as the law to a review and retrial; but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law."

This view is adopted in the case of The United States *vs.* Goodwin, 7 Cranch, 108.

This Court also holds in many cases that final decrees rendered by circuit courts in equity, admiralty, and maritime cases are removable to the Supreme Court only by appeal, where they are reviewable both as to law and the facts. (The Baltimore, 8 Wall., 377; Gruner *vs.* The United States, 11 Howe, 163; Merrill *vs.* Petty, 16 Wall., 338; The Alicia, 7 Wall., 571; Walker *vs.* Dreville, 12 Wall., 440; McCullum *vs.* Eagur, 2 Howe, 61; Sampson *vs.* Welsh, 24 How., 207.)

Section 698, Revised Statutes, also provides that—

> "Upon the appeal of any cause in equity or admiralty or maritime jurisdiction, or of prize or no prize, a transcript of the record as directed by law to be made and of copies of the proofs and of such entries and papers on file as may be necessary on the hearing of the appeal shall be transmitted to the Supreme Court."

In *ex parte* Cooper, *supra*, this Court held that under this statute, "on appeal all questions properly presented are open to determination."

It would seem, therefore, from the foregoing statutes and authorities applying to appeals in

equity cases that all the rulings on the trial of the cause, as well as the giving and refusing of instructions to the jury called to pass upon questions of facts, when properly excepted to and made part of the record, are open to consideration on appeal to this Court.

Act of April 7, 1874.

The Act of April 7, 1874 (18 Stat., 27), prescribing how appeals and writs of error from territorial courts are to be taken to the Supreme Court for review does not seem to be applicable to the District of Alaska, but was intended to apply only to the then *organized territories*, as appears from an examination of the preamble of said act, which is as follows:

> "Whereas, by the organic acts establishing several of the territories of the United States, it is provided that certain courts thereof shall have common law and chancery jurisdiction, and doubts have been entertained whether said jurisdictions must be exercised separately, or whether they may be exercised together in the same proceeding, and whether the codes and rules of practice adopted in said territories which have authorized a mingling of said jurisdictions in the same proceeding, or a uniform course of proceeding in all cases legal and equitable, are repugnant to the said organic acts respectively."

The terms also of the act would seem to exclude Alaska for the following reasons:

First. By its terms it applies to the then "organized territories," and purports to provide a uniform method of obtaining reviews of decisions of the courts of such territories.

Second. It does not seem to apply to Alaska because Alaska was not only not an organized territory, but at that time, and for more than ten years thereafter, had no court at all, or semblance of territorial organization.

Third. At the date of the act Alaska had neither "organic act" nor local legislature which might have "adopted a code of rules of practice," as was recited to have been the case in the several territories referred to in the preamble; but, on the contrary, all the legislation for Alaska has been enacted by Congress.

Fourth. The second paragraph of the act providing a uniform method of obtaining a review of judgments or decrees of said courts expressly applies to "said territorial courts" mentioned in the preamble, viz., in the several territories then organized.

This Court in the Coquitlan case (163 U. S., 346) defines the District Court of Alaska as the supreme court of a territory within the meaning of the Court of Appeals Act of March 3, 1891 (26 Stat., 826), for purposes of appellant jurisdiction, but nothing in that decision can be held to have construed the Territorial Act of 1874, *supra*, as applying to Alaska, nor did the Act of 1891 under

consideration in that decision amend or change the former act in its special application to the courts of organized territories and procedure for review of their decisions by this Court.

We conclude, therefore, that appeal was the proper method whereby to bring the entire record of the case under consideration before this Court for review, "as in other cases," referred to in section 7 of the Alaska Act of May 17, 1884, viz., Revised Statutes, section 692, and decisions cited, *supra*, defining the proper practice for bringing up equity cases by appeal for review by this Court; and on such appeal, as held in *ex parte* Cooper, *supra*, "all questions properly presented are open to determination."

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